

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LENIER AYERS,

Plaintiffs,

v.

KELLY CUNNINGHAM, *et al.*,

Defendants.

Case No. C10-5850RJB/JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of Magistrate Judge J. Richard Creatura (Dkt. 4) and the Plaintiff's Motion for Stay to Be Removed and Service of Action to Be Commenced on the Defendant's [sic] in CSN C10-5850 (Dkt. 5). The Court, has reviewed the Report and Recommendation of Magistrate Judge J. Richard Creatura, objections to the Report and Recommendation, Plaintiff's motion and the remaining record.

The facts are related in the Report and Recommendation (Dkt. 4, at 1-4) and are adopted here by reference. Plaintiff files two pleadings in response, the pending motion (with attachments) and objections to the Report and Recommendation.

ORDER - 1

A. REPORT AND RECOMMENDATION

The Report and Recommendation recommends denial of Plaintiff's application to proceed *in forma pauperis* ("IFP") due to Plaintiff's failure to be truthful with the Court regarding the number of cases he has filed and whether he has any money in his prisoner's account. Dkt. 4. The Report and Recommendation notes that Plaintiff has failed to provide the Court with the date he was last employed. *Id.* The Report and Recommendation also notes that Plaintiff has failed to provide the Court with information regarding his personal finances in other actions (including the fact that he had settled a case for \$12,000). *Id.*

The Report and Recommendation should be adopted and Plaintiff's case dismissed with prejudice. Plaintiff argues, in his objections, that he did list all of the cases he has filed. Dkt. 6. As stated in the Report and Recommendation, the Court's files indicate otherwise.

He argues that he does not have money in his account with the Special Commitment Center ("SCC"). Dkt. 6. He attaches a "Request for Resident Account Information" in which the "Reply" section is dated December 17, 2010. Dkt. 6, at 5. The Reply indicates that Plaintiff has a negative balance of \$285.76 in his account. *Id.* Plaintiff argues that the documentation referred to in the Report and Recommendation "fraudulently" indicated that he had around two hundred eighty five dollars in his account. *Id.* He repeats his argument that he has no funds. Dkt. 6. Plaintiff's submission does not resolve the central issue: when he applied for IFP, he told the Court he did not have funds, and the documents in the Court file at that time indicated the contrary.

As to his past disclosures to the Court, Plaintiff argues that he did not have to reveal the \$12,000 settlement in 06-5264RBL/KLS (referenced by the Report and Recommendation) in his application for IFP in case number 08-5390BHS/KLS because the settlement in 06-

5264RBL/KLS was over 12 months old. Dkt. 4. The application for IFP in 08-5390BHS/KLS was made in June of 2008. Dkt. 1 in 08-5390BHS/KLS. Plaintiff acknowledges that the settlement in 06-5264RBL/KLS was in July of 2007, less than 12 months before the 08-5390BHS/KLS was filed. Dkt. 4. Plaintiff continues to fail to be candid with this Court. The Report and Recommendation should be adopted and the case dismissed pursuant to 28 U.S.C. § 1915(e)(2)(A).

B. PLAINTIFF'S MOTION

In his motion, Plaintiff requests the "stay be lifted." Dkt. 5. Plaintiff's motion should be denied. At the time the motion was filed, the case had not been stayed.

Plaintiff further moved for the complaint to be served. Dkt. 5. In light of the above adoption of the Report and Recommendation, the motion for the complaint to be served should be denied.

Accordingly, it is hereby **ORDERED** that:

1. The Court **ADOPTS** the Report and Recommendation (Dkt. 4);
2. This action is **DISMISSED** pursuant to 28 U.S.C. 1915 (e) (2) (A) as the affidavit of poverty is untrue.
3. The motion to proceed in forma pauperis is **DENIED**. Further, pursuant to 28 U.S.C. 1915 (a)(3) an appeal *in forma pauperis* may not be taken as the appeal would not be in good faith.
4. Plaintiff's Motion for Stay to Be Removed and Service of Action to Be Commenced on the Defendant's [sic] in CSN C10-5850 (Dkt. 5) is **DENIED**.
5. The Clerk is directed to send a copy of this Order to Plaintiff, and to the Hon. J. Richard Creatura.

1 DATED this 10th day of January,2011.

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4 ROBERT J. BRYAN
5 United States District Judge
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